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Supreme Court, U.S.
FILED

No. 97-1747 APR 23 1998

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In The

Supreme Court of the United States

October Term, 1997

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION,

Petitioner,

vs.

MARY M., as Parent and Next Friend for DIANE M., a Minor (Names are pseudonyms),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Whether junior high school students should have to prove, as an element of their Title IX hostile environment sexual harassment claim, that the harassment they claim to have suffered was "unwelcome"?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Mary M., individually and as parent/next friend for Diane M., minor v. North Lawrence Community School Corporation*, 131 F.3d 1220 (7th Cir. 1997). It is reprinted in the Appendix at 1a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 12, 1997. Petitioner's petition for rehearing was denied on January 23, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in relevant part:

> No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Respondent, Diane M., was a thirteen-year-old eighth grade student at Bedford Junior High School in April 1993. Record of Proceedings, Rec. Vol. III-781, Diane M. Direct. Petitioner North Lawrence Community School Corporation operated Bedford Junior High School. Rec. Vol. 1-101, Preliminary

Instructions. During this time, twenty-one-year-old Andrew Fields worked at Bedford Junior High as a cafeteria worker. Rec. Vol. IV-947-948, Fields Direct. Diane M. and Fields met in the lunch room where Fields worked as a cashier. Rec. Vol. IV, 950-951, Fields Direct. Fields and Diane M. began dating shortly thereafter, but the two hid the nature of their relationship from Diane M.'s parents and others. Rec. Vol. III-804, Rec. Vol. IV-823, Diane M. Direct.

On May 20, 1993, Fields and Diane M. devised a plan to skip work and school the following day, a Friday. Rec. Vol. IV, 959-961, Fields Direct. Diane M. left for school as usual on Friday, May 21, but met Fields at a local gas station instead of going to her bus stop. Rec. Vol. III-847, Diane M. Direct. Diane M. had Fields drive her to the home of a friend. Rec. Vol. IV-961, Fields Direct. Alone in the home, Diane M. and Fields had sexual intercourse for the first and only time. Rec. Vol. IV-963, Fields Direct. Fields used no threats or force in order to have intercourse with Diane M. Rec. Vol. IV-890, Diane M. Cross.

On Friday morning, May 21, 1993, Bedford Junior High School Principal Jimmy Pounds talked with school counselor Carol Powell. Mrs. Powell reported that two students told her Diane M. was skipping school with Andrew Fields. Rec. Vol. I-219, Pounds Direct.

When Andrew Fields returned to work on Monday, May 24, 1993, he was fired. Rec. Vol. IV-956, Fields Direct. Criminal charges were filed against Andrew Fields for child molesting, and he was convicted of those charges. Rec. Vol. IV-966-967, Fields Direct.

B. Prior Proceedings

On October 24, 1994, Diane M. and her mother brought suit in the Southern District of Indiana, based upon a violation of Title IX of the Educational Amendment Act of 1972, 20 U.S.C. § 1681, and 28 U.S.C. § 1983, against Andrew Fields; the North Lawrence

Community School Corporation; the North Lawrence Community School Corporation School Board; and the school principal, the school superintendent, the school board members, and a school counselor, in their individual and/or official capacities. The petitioners sought compensatory and punitive damages against all defendants.

On November 1, 1995, the district court dismissed the School Board members. On April 2, 1996, the district court granted partial summary judgment to the individual respondents and dismissed the 42 U.S.C. § 1983 claims. The district court's order dismissed all claims other than the Title IX claim. On the eve of trial, Andrew Fields settled with the petitioners.

A jury trial was conducted on October 21-28, 1996, solely on the petitioner's Title IX claims against the North Lawrence Community School Corporation. In Final Instruction No. 13, the Court instructed the jurors that they were to consider Diane M.'s receptiveness to Fields' attentions in the light of her age, her emotional predisposition, and the age and power disparity between Diane M. and Fields. Rec. Vol. V-1186, 1187.

The jury returned a verdict in favor of the petitioners and against the respondent on the issue of liability. However, the jury awarded zero (0) dollars in damages. (Appendix B-21a).

On December 12, 1997, the Seventh Circuit reversed the judgment of the district court and remanded the case. The Seventh Circuit found that a thirteen year old child cannot welcome the advances of a twenty-one year old man, and therefore, the Court's Final Instruction No. 13 was erroneous.

On January 23, 1998, the Seventh Circuit denied the North Lawrence Community School Corporation's Petition for Rehearing. (Appendix D-35a).

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S HOLDING THAT A THIRTEEN YEAR OLD STUDENT CANNOT, AS A MATTER OF LAW, WELCOME THE ADVANCES OF AN ADULT SCHOOL EMPLOYEE AND THEREFORE SHOULD NOT HAVE TO PROVE THAT THE HARASSMENT SHE SUFFERED WAS "UNWELCOME", IS IN CONFLICT WITH EIGHTH AND TENTH CIRCUIT DECISIONS.

Diane M. charged the North Lawrence Community School Corporation with violating her rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which states in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program receiving Federal financial assistance . . . .

Diane M. alleged that she was subjected to hostile environment sexual harassment. Hostile environment sexual harassment occurs when

> unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive environment.

Kinman v. Omaha Public School District, 94 F.2d 463, 467 (8th Cir. 1996).

The gravamen of any sexual harassment claim is proof that the alleged harassment or abuse was "unwelcome." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68, 106 S. Ct. 2399, 2406 (1986). In an educational context, the relevant question "is not whether [the student] voluntarily participated in sexual relations, but rather whether the advances were unwelcome." *Kinman*, 94 F.2d at 468 (8th Cir. 1996), *citing to Meritor*, 477 U.S. at 68, 106 S. Ct. at 2406 (1986).

In *Kinman*, a high school sophomore became sexually involved with her English teacher. The Eighth Circuit held that to establish a prima facie case of Title IX hostile environment sexual harassment in an educational context, the student must show that she was subject to unwelcome sexual harassment. *Id.* at 467, 468, citing to *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996).

The district court judge relied upon *Kinman* and *Seamons* as support for its Instruction No. 13, which read as follows:

> In order to find in favor of the plaintiff, you must find first that the alleged sexual advances and/or abuse occurred, and if it did, that the advances and/or abuse were unwelcome by her. Conduct is unwelcome if Diane M. did not solicit or incite it, and if she regarded the conduct as undesirable or offensive. In determining whether the conduct was unwelcome, you should consider such things as Diane M.'s receptiveness to the alleged sexual advances and/or abuse in light of her words, acts and demeanor; her emotional predisposition, if any; her age; the age disparity between her and Andrew Fields; and any power disparity between them due to Diane M.'s status as a student and Andrew Fields' status as a school employee.

Rec. Vol. IV, 1087; Rec. Vol. V, 1186-1187.

The district court instructed the jury that age was but one of many factors for the jury to consider. The district court's instruction paralleled the Department of Education's Office of Civil Rights Guidelines which were promulgated in March of 1997:

> In order to be actionable as harassment, sexual conduct must be unwelcome. Conduct is unwelcome if the student did not request or invite it and "regarded the conduct as undesirable or offensive." Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome . . . OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.
>
> * * *
>
> In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption, OCR will consider a number of factors in determining whether a school employee's conduct could be considered welcome. . . . The factors include: The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student.

Federal Register, Vol. 62, No. 49, p. 12034, Thursday, March 13, 1997.

Although the OCR guidelines were promulgated after the completion of the jury trial in this case, it is noteworthy that the office charged with enforcing civil rights of students in educational contexts agrees that sexual conduct must be unwelcome to be actionable.

The Seventh Circuit held that on remand, the district court should instruct the jury that plaintiff must prove that:

(1) She belonged to a protected group;

(2) She was subjected to harassment;

(3) The harassment was based on sex;

(4) The harassment was so pervasive or severe that it altered the conditions of plaintiff's education; and

(5) School officials had knowledge of the harassment.

These elements were outlined in *Kinman v. Omaha*, the same case from which the district court judge borrowed the elements for Instruction No. 13. However, the Seventh Circuit overlooked the fact that *Kinman* requires that a plaintiff prove that the sexual harassment was unwelcome. Although the Seventh Circuit rejected the application of Title VII workplace "unwelcomeness" standards to Title IX sexual harassment cases involving students, the Court did not define "sexual harassment." "Unwelcomeness" is an essential prong of the definition of sexual harassment, as stated by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

The Seventh Circuit incorrectly concluded that Diane M. was an elementary school student under Indiana law. (Appendix

A-13a, n.6). The Seventh Circuit interjected a point on its own initiative that was not argued or disputed by the parties. The uncontroverted evidence at trial was that Diane M. was a junior high school student, about to be passed on to her freshman year in high school. The Indiana Administrative Code distinguishes between elementary, middle/junior high school students, and high school students for purposes of curriculum. 511 IAC 6.1-1-4(r). 511 IAC 6-1-1(p) defines "middle/junior high school" as any combination of grades five (5) through (9) as designated by the local corporation. Under the code definitions, appellant was a junior high school student.

CONCLUSION

The Seventh Circuit's failure to include "unwelcomeness" as an element of a hostile environment sexual harassment claim is contrary to the definition of sexual harassment as set forth by this Court in *Meritor*. Further, the Seventh Circuit is in direct conflict with the Eighth and Tenth Circuits by excluding "unwelcomness" from the elements to be proved by plaintiffs in their hostile environment sexual harassment claims. For these reasons, Petitioner North Lawrence Community School Corporation respectfully requests that this Court issue a writ of certiorari issue to review the opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A — JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 97-1285

Date: December 12, 1997

JUDGMENT — WITH ORAL ARGUMENT

BEFORE:

Honorable WILLIAM J. BAUER, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

MARY M., Individually and as Parent/Next Friend for DIANE M., A Minor,

Plaintiff – Appellant

v.

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION,

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division No. 94 C 143, Sarah Evans Barker, Chief Judge

Appendix A

The judgment of the District Court is REVERSED, with costs, and this cause is REMANDED with instructions, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-1285

MARY M., individually and as parent/next friend for DIANE M., a minor,

Plaintiff–Appellant,

v.

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION,

Defendant–Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. 94 C 143 — **Sarah Evans Barker**, *Chief Judge.*

ARGUED OCTOBER 20, 1997 —
DECIDED DECEMBER 12, 1997

Appendix A

Before BAUER, FLAUM, and KANNE, *Circuit Judges.*

BAUER, *Circuit Judge.* On May 21, 1993, Diane M., a thirteen year old eighth grader at Bedford Junior High School, was seduced by a twenty-one year old cafeteria worker named Andrew Fields. Diane's mother, Mary M., sued the North Lawrence Community School Corporation and various individuals on her daughter's behalf, alleging violations of 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. Summary judgment was granted on the § 1983 count and on the Title IX count in favor of various individual defendants, leaving only the count against Andrew Fields and the North Lawrence Community School Corporation. Fields and Mary M. settled on the eve of trial, and the case proceeded against North Lawrence Community School Corporation. At trial, Chief Judge Sarah Evans Barker ruled that "welcomeness" was an issue properly before the jury, and allowed evidence of Diane's responses to Fields' advances. The jury returned a verdict finding the defendant liable, but awarded plaintiff nothing in compensatory and punitive damages. Because we find that the issue of welcomeness was improperly before the Jury, we reverse.

BACKGROUND

The disturbing facts of this case began in April of 1993, when Diane M. was a thirteen year old eighth grade student at Bedford Junior High School and Andrew Fields was a twenty-one year old cashier and fry cook employed by the school. Bedford Junior High School is operated by the North Lawrence Community School Corporation ("NLCSC"), the defendant in this case.

Appendix A

Diane M. and Andrew Fields met in the school lunch room in April 1993 when Diane passed through Fields' cashier line. By the end of the month, Fields was flirting with Diane. Diane and her friends thought being the object of attention of a twenty-one year old was neat, and Diane responded. Fields began passing suggestive notes to Diane while she stood in the lunch line, and their relationship graduated to phoning each other. Diane's parents were totally unaware that the two were "dating." Diane's friends, however, did know of the relationship, and many were privy to Fields' notes. At trial, the girls expressed their naivete as to the suggestive comments in Fields' notes, stating that "we had never heard some of the things that were said in the notes before."

On May 7, 1993, Fields attended a school dance as a chaperon. He and Diane M. danced together most of the evening. None of the seventeen to twenty-one school employees present at the dance reported any inappropriate touching between Diane and Fields, although several of Diane's friends testified at trial that the two were openly touching and kissing and had to be physically separated by a chaperone. Additionally, none of the chaperones questioned the fact that Diane and Andrew left the dance together. School chaperones in attendance that evening denied witnessing any such activities.

Following the dance, Diane and Fields became the talk of the eighth grade. According to Diane, the Monday following the dance she was approached and questioned by three teachers about her involvement with Fields. Again, all of the teachers denied these conversations occurred.

Diane and Fields' relationship continued, and he soon began waiting for her in the gym after school to give her a ride

home. Diane's parents were still unaware of their daughter's involvement with Fields. Diane was careful to hide her relationship with Fields from her parents because she knew that her mother thought she was too young to date. According to the plaintiff, Diane's teachers were also aware of this fact. Mary M. testified at trial that she had expressed her prohibition against dating to one of Diane's teachers, and had instructed the teacher to contact her if she noticed or heard of Diane carrying on with any boys. The teacher denied the conversation. According to Diane and her friends, the teacher was aware of Diane and Fields' relationship.

One month into their relationship, Diane and Fields decided to skip school and work together, respectively. They devised a plan whereby Diane left home as usual on Friday, May 21, but rather than going to her bus stop, she met Fields at a local gas station. Fields picked up Diane at the gas station, and the two then drove to Diane's friend Christy Skein's house. By 9:00 a.m. Diane and Fields were alone in the Skeins' home, with Christy and her brother at school. Pretending to be Diane's mother, Mrs. Skein called Jimmy Pounds, the school principal, from her job and informed Mr. Pounds that Diane was sick and would not be attending school that day. When asked by Principal Pounds for a telephone number where she could be contacted, Mrs. Skein said that she did not know her phone number, that "they told me to say this," and hung up.[1]

According to testimony adduced at trial, Principal Pounds was aware that Diane M. and Fields intended to skip school/ work on May 21, having been informed on May 20 by both a

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1. Mrs. Skein subsequently disappeared and was therefore unavailable at trial.

student and by the director of transportation. Tony Warren, a classmate of Diane's, informed Principal Pounds that Diane was planning to skip school the next day with a cafeteria worker, and that Diane and this cafeteria worker had been on a date May 7, the night of the school dance. Principal Pounds testified that he did not believe this rumor to be true, as Tony Warren was "the biggest gossip at Bedford Junior High School." Pounds stated on cross-examination that he also did not believe Warren because of the recent publication of a picture of Fields and his fiancee in the Bedford paper.

Principal Pounds also received information as to Diane and Fields' plans to spend May 21 together from Wendell Bailey, the director of transportation. Wendell Bailey informed Pounds the afternoon of May 20 that a school bus driver overheard three or four girls talking about Diane's planned absence the next day. According to Pounds, Bailey told him that the bus driver heard that Diane was going to spend the day at Spring Mill Park with "the french frier." Pounds' response to Mr. Bailey: "we've heard the girl is going to be absent." Whether Pounds found Mr. Bailey any more reliable than Tony Warren is unclear.

The following morning, before the start of school, Pounds' secretary handed him a hand-written note from Tony Warren providing Pounds with Diane's parents' phone number. In its entirety, the typed-written, unsigned note read as follows:

> Mr. Pounds,
>
> Here is the *real* phone number that will get you to [Diane M.'s] trailer, but *don't* tell her or anyone else that I gave you the information that I gave you yesterday, or that I gave you the number. It's

[000-0000]. That number will put you right to her mom & dad.

That is the number where they live.

[000-0000].

(emphasis in original).

Despite his testimony that he did not believe the rumor that Diane and Fields were planning to spend the day together, Principal Pounds told his secretaries to be on the lookout for Diane's name on the absentee list. After receiving the phony call from Mrs. Skein, Principal Pounds checked to see if Fields had reported for work. Only upon learning that he had not did Pounds telephone Diane's mother. He advised Mary M. that Diane had skipped school and might be spending the day with an unnamed, older male. When asked by Mary M. for the name of this boy and any additional information, Principal Pounds replied that he could not tell her anything until he had more facts. Pounds never called Mary M. back with Fields' name or additional facts.

After telephoning Mary M., Pounds talked with Carol Powell, a school counselor, who reported to him that two students told her that Diane M. was skipping school with Andrew Fields. Pounds told Powell to call the Welfare Department.

Meanwhile, back at the Skeins' house, Fields went out to a nearby convenience mart to call in sick to work (the Skeins did not have a telephone). When he returned, the two listened to the radio and danced a little until Fields seduced Diane. They

had sexual intercourse for the first and only time and then spent the rest of the day at Spring Mill Park. Fields then dropped Diane off at the same gas station where he picked her up earlier in the day.

Diane returned home that afternoon as if she had been in school all day. Her fears of being, in her words, "busted" for skipping school were soon confirmed when her mother returned home from work. When asked about skipping school, Diane did not tell her mother the truth about how she spent her day; rather, Diane said that she skipped school with her friend Christy and another boy named Matt.

When school resumed the following Monday, counselor Carol Powell withdrew Diane from class and escorted her to Principal Pounds' office. Powell took a statement from Diane in which Diane lied about the events of May 21 by denying that she and Fields had sexual intercourse. Powell read Diane's statement to Pounds and Assistant Superintendent Turner, and Diane was asked to sign her statement. By the end of the school day, Andrew Fields was fired.

Also on that Monday, Diane told her mother the truth about what happened on the day she skipped school. Her mother took her to the hospital emergency room, where she was given a pelvic exam, a pregnancy test, and an AIDS test. Mary M. also took Diane to the police station. Criminal charges were eventually, and reluctantly, filed against Fields for child molestation. Following a bench trial, Fields was convicted of the charge and sentenced to six years incarceration, two years executed and four years suspended, at the Indiana Department of Corrections. Fields actually served only one year of his two year executed sentence, being released early pursuant to Indiana good time credit rules.

Appendix A

Mary M., on behalf of her daughter Diane M., brought this lawsuit against NLCSC and various school officials and employees, including Andrew Fields, alleging violations of 42 U.S.C. § 1983 and of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The district court, Judge S. Hugh Dillin, granted partial summary judgment for defendants on April 2, 1996, resulting in the dismissal of the § 1983 claim and of all party defendants except Andrew Fields. On the eve of trial plaintiff settled with Fields, leaving only a Title IX claim against NLCSC to be resolved. NLCSC moved for summary judgment on Mary M.'s Title IX claim, which Judge Dillin denied.

The case was then reassigned to Chief Judge Sarah Evans Barker, and a five day jury trial ensued. The jury returned a verdict in favor of Diane M. on the issue of liability, but did not award her any compensatory or punitive damages. Plaintiff's main contention on appeal is that the district court judge erred in permitting the question of "welcomeness" to be placed before the jury. In a pre-trial ruling, Judge Barker held that welcomeness was a question of fact reserved for the jury and not a question of law. The judge ruled that to state a claim for relief under Title IX, the plaintiff must prove the following elements: (1) Diane M. was subject to unwelcome sexual advances and/or abuse by Andrew Fields; (2) the advances and/or abuse were sufficiently severe or pervasive so as to alter the conditions of Diane M.'s education and create a hostile or abusive educational environment; (3) the school corporation knew or should have known of the alleged sexual advances or abuse; and (4) the school corporation had the opportunity, but failed, to take reasonable, prompt, and effective remedial or preventative measures. Instruction No. 11.[2] As such, the jury would hear

2. The parties stipulated that NLCSC is an educational institution that receives federal funds.

evidence regarding whether Fields' seduction was welcomed by Diane. This error is manifested, according to plaintiff, in Instruction No. 13, which reads:

> In order to find in favor of the Plaintiff, you must find first that the alleged sexual advances and/or abuses occurred, and if it did, that the advances and/or abuse were unwelcome by her. Conduct is unwelcome if Diane M. did not solicit or incite it, and if she regarded the conduct as undesirable or offensive. In determining whether the conduct was unwelcome, you should consider such things as Diane M.'s receptiveness to the alleged sexual advances and/or abuse in light of her words, acts and demeanor; her emotional predisposition, if any; the age disparity between her and Andrew Fields; any power disparity between them due to Diane M.'s status as a student and Andrew Fields' status as a school employee.

Plaintiff also alleges on appeal that the district court erred in not granting her motion for a new trial. Because we find that the instruction regarding welcomeness so tainted the trial, we reverse and remand for a new trial.

ANALYSIS

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, prohibits sexual discrimination in educational programs and activities which receive federal funds. Specifically, Title IX provides, in pertinent part, that "[n]o person . . . shall, on the basis of sex, be denied the benefits of, or be subjected to any discrimination under any education program . . . receiving

Federal financial assistance." 20 U.S.C. § 1681(a). The United States Supreme Court provided for a private right of action against an educational institution under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979), and granted private litigants the right to recover compensatory damages for a Title IX violation in *Franklin v. Gwinett County Pub. Sch.*, 503 U.S. 60, 75-77 (1992).

We note at the outset that unlike this Court's recent decision in *Smith v. Metro. Sch. Dist. Perry Township*, No. 95-3818, 1997 WL 656772 (7th Cir. Oct. 22, 1997), this case does not present a problem concerning the appropriate defendant to a Title IX action. In *Smith*, issued two days after oral arguments were heard in this case, a divided panel held that "a school district is liable for teacher-student sexual harassment 'only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.'" Slip Op. at 43 (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997)). This Court found that the school district was not liable for the sexual harassment[3] by one of its teachers because there was no evidence that a school official knew of the alleged harassment and failed to respond. *Id.*

Here, in contrast, there is sufficient evidence that a school official knew of the sexual harassment by one of its employees and failed to respond. Principal Pounds knew that Diane and Fields were planning to skip school/work the day before they actually did. He was informed by two people the day before

3. The *Smith Court* also found that sexual harassment of a student constitutes discrimination "on the basis of sex" for purposes of Title IX. *Smith*, Slip Op. at 14.

and failed to act on that information. While Pounds claimed not to have believed one of the sources, he said nothing as to whether he believed the second source. And when the second source informed Pounds that Diane was going to skip school with the "french frier," Pounds replied that he was already aware of this. Pounds alerted his secretaries to be on the lookout for Diane's name on the absentee list, indicating that he at least suspected that the "rumors" he heard were true.[4] Additionally, Pounds was informed that Diane and Fields were on a date the night of the school dance. This is sufficient evidence to prove that Pounds, a school official, knew of the harassment in question.[5] He had the power as a school principal to take action, and failed to do so. With the proper defendant in front of us, we turn to address appellant's contentions.

Appellant's primary argument centers around the district court's decision to allow the issue of welcomeness to be presented to the jury. Plaintiff argues that Judge Barker's pre-trial

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4. The fact that Pounds did not believe these sources did not excuse him from further investigation. Under federal law, all education programs receiving federal financial assistance must designate at least one "responsible employee" to investigate complaints of sexual harassment and must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of harassment. 34 CFR § 106.8(a)-(b). At the very least Pounds should have contacted the school's designated "responsible employee," assuming Bedford Junior High had one and was in compliance with these regulations.

5. That Fields was an employee of Bedford Junior High School and not a teacher is immaterial for purposes of Title IX Title IX prohibits discrimination "on the basis of sex" under "any education program or activity receiving Federal financial assistance" and does not specify who must be doing the discriminating. 20 U.S.C. § 1681.

ruling allowing welcomeness to be before the jury is wrong in that a thirteen year old cannot welcome the sexual advances of a twenty-one year old. Accordingly, plaintiff objected to Instruction No. 13, which, *inter alia,* placed welcomeness before the jury.

Our review of jury instructions is limited. *Wilson v. Williams,* 83 F.3d 870, 874 (7th Cir. 1996). We review the district court's actions for an abuse of discretion. *American Nat'l Bank & Trust Co. v. Regional Transp. Auth.,* 125 F.3d 420, 431 (7th Cir. 1997). We will order a new trial only if it appears that "the jury was misled and its understanding of the issues was seriously compromised, to the prejudice of the losing party." *Tyus v. Urban Search Management,* 102 F.3d 256, 264 (7th Cir. 1996), *cert. denied,* 117 S. Ct. 2409 (1997). Our analysis, then, is in two parts. First we must determine if the instruction misstates or insufficiently states the law; if so, we must then determine whether the error has prejudiced the complaining party. *Wilson,* 83 F.3d at 874.

We believe that the trial judge's welcomeness instructions were given in error. Welcomeness is an improper inquiry to be made in Title IX cases involving sexual discrimination of elementary school children.[6] No court has yet addressed the

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6. Judge Barker incorrectly stated throughout the trial and in her bench rulings that Diane M. was not an elementary school student. Indiana Administrative Code provides that Elementary school means any combination of grades kindergarten (K) through eight (8)." 511 IAC 6-1-1. As an eighth grader, Diane M. was an elementary school student at the time of the events in question. We decline to opine, however, on whether secondary school students can welcome sexual advances in harassment claims arising under Title IX.

issue of whether an elementary school child can welcome sexual advances, and cases cited by appellee are inapposite. In fact, at least one of the three cases cited by appellee leads to an opposite conclusion.

Appellee cites *Does v. Covington County Sch. Bd. of Educ.* as an example of a case where the court required an elementary school child to prove the sexual abuse was unwelcome. *Does v. Covington County Sch. Bd. of Educ. (Does I)*, 930 F. Supp. 554 (M.D. Ala. 1996). However, in *Does I* the court expressed no opinion as to whether the harassment at issue was unwelcome. Rather, the court reserved its ruling on defendant's motion for summary judgment until the plaintiffs submitted a brief offering more specific evidence of, *inter alia*, welcomeness. *Id.* at 569-70. After the briefing was completed, the court granted defendant's motion for summary judgment against two of the four plaintiffs and specifically held that "[w]hen dealing with the sexual abuse of elementary students, it may be presumed that the abuse is unwelcome." *Does v. Covington County Sch. Board of Educ. (Does II)*, 969 F. Supp. 1264, 1277 (M.D. Ala. 1997). If anything, *Does II* counsels in favor of appellant's argument that an elementary student cannot welcome sexual harassment.

Appellee's reliance on *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997) (en banc), is similarly misplaced. *Davis* expressed no opinion as to whether elementary students must prove unwelcomeness, but rather found that an educational institution can be held liable under Title IX for student-student sexual harassment.[7] *Id.* at 1193. The *Davis* opinion was later

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7. Courts recognize at least two types of sexual harassment. The first, called "quid pro quo" harassment, occurs when the receipt of benefits or the maintenance of the status quo is conditioned on

(Cont'd)

reversed by an en banc Eleventh Circuit, which held that it would not recognize a claim for student-student sexual discrimination under Title IX *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc). Finally, appellee's reliance on *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), is erroneous. *Meritor* dealt with sexual harassment in the context of Title VII employment discrimination and said nothing as to whether an elementary school child must prove that the complained of sexual abuse was unwelcome.

While welcomeness is properly a question of fact in the context of Title VII employment discrimination cases, *Meritor*, 477 U.S. at 67, we decline to extend the inquiry to Title IX cases when elementary students are involved. It goes without saying that sexual harassment in the work place is vastly different from sexual harassment in a school setting.

(Cont'd)

acquiescence to sexual advances. *Kinman v Omaha Pub. Sch. Dust.*, *94* F.3d 463, 467 (8th Cir. 1996). The second, called "hostile environment" harassment, occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive environment. *Id.* Some district courts also recognize a third type of sexual harassment for Title IX purposes, called "student-student" or "peer-to-peer" harassment, which occurs when students are subjected to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment. *See, e.g., Bruneau By and Through Schofield v South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 172 (N.D. N.Y. 1996); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp 1193, 1205 (N.D. Iowa 1996). Plaintiff in this case bases her claims on a hostile environment theory of discrimination. We therefore have no occasion to rule on whether this Circuit will recognize a claim for peer-to-peer sexual harassment.

> The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

Davis, 74 F.3d at 1193 (11th Cir. 1996) (citation omitted), *rev'd*, 120 F.3d 1390 (1997). Schools are charged with acting *in loco parentis*, while employers owe no such duty to their employees. Further, employees are older and (presumably) know how to say no to unwelcome advances, while children may not even understand that they are being harassed. Thus, given the difference between the two environments, we refuse appellee's directive to apply welcomeness as it has been interpreted in the Title VII context to Title IX cases. *See Smith*, No. 95-3818, 1997 WL 656772 (refusing to apply Title VII agency principles to Title IX when determining whether a school can be held accountable for a teacher's sexual harassment of a student); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st

Cir. 1988) (limiting application of Title VII principles to only those Title IX cases involving employment discrimination).

With no case on point, we look to other sources of law for clarification. In criminal law, elementary school children cannot consent to sex. The Indiana criminal code in effect at the time of the events in question provided that a person under the age of sixteen cannot consent to sexual intercourse. *See* Ind. Code 35-42-4-3(c). Similarly, this Court in an en banc decision held that a thirteen year old cannot be said to appreciate the full risk and consequences of sexual intercourse, and that the statutory rape of a thirteen year old is so serious a crime as to amount to an act of violence for sentencing purposes. *See United States v. Shannon,* 110 F.3d 382, 388-89 (7th Cir.) (en banc) (statutory rape of a thirteen year old is a crime of violence under U.S.S.G. § 4B1.2(1)), *cert. denied,* 118 S. Ct. 223 (1997). If elementary school children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous.

An opposite holding would defeat the purposes of Title IX and make children claiming sexual discrimination under Title IX subject to intense scrutiny. Title IX was created to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against discriminatory actions. *Cannon v. University of Chicago, 441 U.S.* 677 (1979). If welcomeness were properly an issue for the jury to consider in cases involving elementary students, the very children bringing the suits would be subject to intense scrutiny regarding their responses to their alleged abusers. Trial transcripts would be replete with insinuations that a child dressed or acted in such a manner as to ask for the very conduct she or he is seeking to redress. In this case, the record demonstrates as

much; every witness called by the plaintiff was subject to questions regarding Diane's reaction to each and every one of Fields' advances. Diane did not sue the school claiming she was raped; she does not contest the consensual nature of her relationship with Fields. Therefore, the questioning regarding her consent to Fields serves only to prejudice her. According to NLCSC at oral argument, a five year old clad in a sexy dress would have a difficult time proving she did not welcome sexual discrimination. We find such a suggestion untenable, and refuse to transfer the onus to the child to prove that in fact she or he did not welcome the complained-of advances. We decline to allow the inference that an elementary student is presumed to have not consented to molestation by a twenty-one year old in a criminal case, but welcomed the same conduct in a civil case.

Having found that Instruction No. 13 is an incorrect statement of the law,[8] we must next address whether Diane has been prejudiced by the erroneous instruction. We find that she has. As we stated above, Diane does not contest that her relationship with Fields was consensual. Therefore, any reference to the fact that she did not object to Fields' advances makes her claim of discrimination appear frivolous. With welcomeness before the jury, the defense is allowed to present the argument that this girl is suing to recover for conduct she herself enjoyed. Such an argument has no place in the trial of a school district charged with discriminating against a thirteen

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8. We note that Instruction No. 11 is also an incorrect statement of the law, as this Court in *Smith* declined to adopt a negligence standard of liability for imputing knowledge to an educational institution. *See Smith*, No. 95-3818, 1997 WL 656772. Therefore element three of Judge Barker's instruction, requiring that the school corporation knew or should have known of the alleged sexual advances or abuse, is erroneous.

year old child. That Diane consented to sex with Fields does not mean she understood the risks associated with her actions. A thirteen year old girl cannot be said to understand the nature of her actions when she engages in sexual intercourse. *See Shannon,* 110 F.3d at 389.

Evidence that Diane did not reject Fields sufficiently misled the jury and resulted in an inconsistent verdict. While we will not venture to guess why or how the jury could have found for Diane on the issue of liability and proceeded to award her nothing in compensatory or punitive damages, we find that the instruction regarding welcomeness is so intertwined the issue of damages as to severely prejudice her. The only way to determine whether the jury believed the welcomeness instruction prohibited it from awarding monetary relief, or whether it believed Diane suffered no damages, is to remand this case for a new trial with instruction that welcomeness is not at issue.

On remand, the district court should instruct the jury that in order to state a claim for hostile environment sexual harassment under Title IX, the plaintiff must prove that: (1) plaintiff belongs to a protected group; (2) plaintiff was subjected to harassment; (3) the harassment was based on sex, (4) the harassment was so pervasive or severe that it altered the conditions of plaintiffs' education; and (5) knowledge by school officials. *See e.g., Smith,* No. 95-3818, 1997 WL 656772; *Kinman v. Omaha Pub. Sch. Dist.,* 94 F 3d 463 467-68 (8th Cir. 1996); *Seamons v. Snow,* 84 F.3d 1226, 1232 (10th Cir. 1996); *Does II,* 969 F. Supp. at 1282.

Because we find that the instruction was erroneous and a new trial is required, we need not address appellant's argument for a new trial.

Appendix A

CONCLUSION

The jury instructions as given by the district court were incorrect statements of the law. A thirteen year old child cannot welcome the sexual advances of a twenty-one year old man. Accordingly, we REVERSE the jury's finding and remand this case for a new trial consistent with this opinion.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA DATED OCTOBER 31, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

CASE NUMBER: NA 94-143-C-D/H

MARY M. et al,

v.

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiff and against the defendant North Lawrence Community School Corporation, with damages in the amount of $-0-.

Date: October 31, 1996

Geraldine Trutelaar Crocket
Clerk

s/ Barbara Williamson
(By) Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA NEW ALBANY DIVISION DATED OCTOBER 18, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CAUSE NO. NA 94-143-C-D/H

MARY M., as Parent/Next Friend for DIANE M., a Minor (Names are pseudonyms),

Plaintiff,

vs.

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION,

Defendant.

ORDER

Plaintiff brings this Title IX claim against defendant North Lawrence Community School Corporation ("NLCSC"), alleging that, when she was a thirteen-year-old eighth grade student at Bedford Junior High School, Diane M. was sexually abused by Andrew Fields, a twenty-one-year-old cafeteria worker at Bedford Junior High School. The parties have requested that the court resolve the following issues prior to trial:

1) plaintiff has filed a motion asking this court to reconsider our ruling, made at a October 2, 1996 pre-trial

conference, excluding evidence of previous allegations of child abuse within the North Lawrence school system and NLCSC's handling of those allegations;

2) plaintiff has requested a ruling on the admissibility of a video cassette tape containing portions of a NSCSC Board meeting held October 13, 1992;

3) the parties have jointly requested a pre-trial ruling on the question of whether the element of "unwelcomeness" has been established as a matter of law in this case because Diane M. was below the state criminal law "age of consent" and Andrew Fields was convicted of child molestation.

For the reasons discussed below, plaintiff's motion to reconsider our October 2, 1996 evidentiary ruling is denied; the video tape of the NLCSC Board meeting is excluded as irrelevant; and we find that the element of "unwelcomeness" has not been established as a matter of law, but is a question of fact to be determined by the jury.

I.

PLAINTIFF'S MOTION TO RECONSIDER

In an on the record pre-trial conference held on October 2, 1996, we granted defendant NLCSC's motion in limine seeking to have excluded all evidence concerning allegations of child molestation by former elementary school principal Jerry Thompson and former school attorney Jan Buker, allegations of child abuse by special education teachers at Parkview Elementary School, the school corporation's handling of those allegations, and any changes in policy implemented by the

school corporation's handling of those allegations, and any changes in policy implemented by the school corporation in response to those allegations. Plaintiff wishes to introduce evidence of these prior unrelated events:

> in order to show an atmosphere where a pattern and history of inaction to reports of suspected child abuse and retaliation by the NLCSC board against whistle blowers who speak out against that practice make it more likely than not that the NLCSC D[efendants]s have acted from an unlawful motive when interfering and covering up in this case.

(D's Memorandum in support of Motion to Reconsider, at 4).[1]

Some of the evidence plaintiff seeks to introduce regarding these prior allegations of abuse within the school system is contained in newspaper articles. It is well established that newspaper accounts which are offered for the truth of the matters asserted therein are inadmissible as hearsay. *Fed. R. Evid.* 801, 802; *Coyne v. Taber Partners I,* 53 F.3d 454, 4621 (1st Cir. 1995) (newspaper articles not inadmissible hearsay where not offered for the truth of the matter asserted); *United States v. Nacrelli,* 468 F.Supp. 241, 254 (E.D.Pa. 1979); *Zenith Radio Corporation v. Matsushita Electric Industrial Co., Ltd.,* 513 F.Supp. 1100, 1232 (E.D.Pa. 1981) (citing cases). We cannot fathom any purpose for introducing these articles other than to prove the truth of the matters asserted, and therefore find that the newspaper articles are properly excludable as inadmissible hearsay.

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1. We are unaware of any allegations of retaliation against whistleblowers in this case.

Furthermore, as discussed below, even if the articles were offered for some other purpose, we believe that the information contained in the articles is both irrelevant and so potentially prejudicial that the articles should be excluded under Rules 402 and/or 403 of the Federal Rules of Evidence.[2] *See, Vukadinovich v. Zentz,* 995 F.2d 750, 755–756 (7th Cir. 1993 (newspaper articles pertaining to complaints arising from dissimilar events are properly excluded).

We stand by our decision to exclude as part of plaintiff's case in chief all evidence, including but not limited to newspaper articles, regarding the prior allegations of child abuse in the NLCSC school system and NLCSC's handling of those allegations. As we stated at the October 2 pre-trial conference, the purpose of this trial is to determine specifically whether NLCSC is liable under Title IX as a result of Andrew Fields' alleged sexual abuse of Diane M. The trial is not to be used to re-hash prior allegations of child abuse within the North Lawrence school system. Evidence of these prior, unrelated instances of alleged abuse, and of the school corporation's handling of them, would only be relevant to this case if it had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rules Evid., Rule 401. We find that evidence of these prior

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2. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

allegations and NLCSC's handling of them is irrelevant and therefore inadmissible. Fed Rules Evid., Rule 402. If plaintiff's counsel believes the door has been opened to such evidence on rebuttal, he shall make his proffer outside the presence of the jury.

Jerry Thompson was an elementary school principal who allegedly molested several male students. The Thompson case involved allegations that a school custodian who discovered Thompson's alleged abuse of the male students was harassed and retaliated against by Thompson. The Thompson case occurred several years prior to the events giving rise to this case, and at a different school. There were no allegations of wrong-doing, cover-up or retaliation on the part of any school officials other than Jerry Thompson, including school board members. Thompson was convicted, but his conviction was overturned on appeal. The facts of the Thompson case are themselves somewhat unclear, but to the extent they have been established by the pre-trial proffer, we find them to be completely irrelevant to the issues in the instant case. Introduction of evidence regarding the allegations of abuse by Thompson would only serve to unnecessarily lengthen the trial, confuse the jury, and unfairly prejudice the defendants. The same is true for the allegations against Jan Buker, a former school attorney who pleaded guilty to molesting a fifteen year old boy whom Mr. Buker apparently met through a boy scout troop, and allegations of abuse by special education teachers at Parkview Elementary School.

The jury must decide in the case at bar if the school officials at Bedford Junior High School knew or had reason to know that Andrew Fields was or would be engaging in inappropriate sexual behavior toward Diane M, and if so, if the school officials

failed to take reasonable remedial and preventative steps. Evidence of the alleged abuse by Thompson, Buker, and Parkview elementary School teachers has little, if any, probative value in this case, and has a very high potential to confuse the issues and unfairly prejudice the defendant. Therefore, because it is irrelevant and highly prejudicial, we exclude all such evidence under Rules 402 and 403 of the Federal Rules of Evidence. Accordingly, plaintiff's motion to reconsider our prior ruling excluding evidence of the Thompson, Buker and Parkview elementary cases and the school corporation's handling of those cases is denied.

II.

ADMISSIBILITY OF VIDEO TAPES

Plaintiff seeks to introduce into evidence a video tape of a NLCSC Board meeting held October 13, 1992, at which Board attorney Jon Bailey presented a report and recommendations regarding child abuse and neglect policies. In accordance with our October 2, 1996 ruling excluding evidence of prior allegations of abuse in the school system, plaintiff has redacted portions of the tape which refer to past allegations of abuse. We have reviewed the redacted tape and conclude that it is irrelevant to the issues in this case and must, therefore, be excluded.

The tape consists of a public meeting at which attorney Bailey presented an oral summary of his written report recommending that certain policies be adopted by the NLCSC Board ("the Board") with regard to reporting and handling of suspected child abuse and neglect, and Bailey's explanation of his understanding of applicable federal and state law requirements. Bailey included in his summary several vignettes

from his personal experience, as well as several hypothetical situations. Bailey's presentation was followed by the Board President's historical summary of efforts of the NLCSC Board to prevent child abuse and to otherwise address concerns regarding child abuse as well as his explanation of the importance the Board attaches to such matters.

There is no issue in this case as to whether Bailey's advice was proper or whether or to what extent the Board followed Bailey's advice with regard to NLCSC's child abuse policy. The only issue regarding the Board's policy is what policy was in place at the time of the events giving rise to this lawsuit. The best evidence of that obviously is the policy itself; there is no need to look behind the policy or to evaluate the wisdom of the policy or review Bailey's recommendations to the Board. Furthermore, we note that while the meeting shown on the video tape was a public meeting, it is not clear who specifically was present at the meeting and heard Bailey's summary of his report and recommendations. For the above reasons, we believe that the video tape is irrelevant to the issues which the jury must decide and would only serve to unnecessarily lengthen the trial and perhaps confuse the issues. There is arguably some possibility that the video tape might become relevant as rebuttal to testimony which may develop during trial. Therefore, we will exclude the tape as part of plaintiff's case in chief, but reserve judgment on its admissibility as rebuttal evidence should the need arise. Again, if such use on rebuttal is intended, the proffer must be made outside the presence of the jury.

Appendix C

III.

"WELCOMENESS"

One of the legal elements of a Title IX claim is proof that the alleged harassment or abuse was "unwelcome." *See Kinman v. Omaha Public School District*, 94 F.3d 463, 468 (8th Cir. 1996), *citing Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68, 106 S. Ct. 2399, 2406 (1986); *Heather Smith v. Metro. School Dist. Perry Township, et al.*, No. 93-707-C (S.D.Ind., August, 1995) (McKinney, J.) (unpublished). The parties have requested a ruling form the court as to whether the fact that Diane M. was under the age of consent established in Indiana's child molestation statute,[3] or that Andrew Fields has been convicted of child molestation under that statute, means that the alleged conduct was *per se* "unwelcome" for the purposes of this Title IX civil action.

Plaintiff first contends that Judge Dillin has already established, in his June 3, 1996 entry denying summary judgment on plaintiff's Title IX claim, that "unwelcomeness" need not be proven in this case. Specifically, plaintiff points to the following language on pages five and six of Judge Dillin's June 3 entry:

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3. Indiana Code § 35-42-2-3(c), provides that:

> A person sixteen (16) years of age or older who, with a child of twelve (12) years of age or older but under sixteen (16) years of age, performs or submits to sexual intercourse . . . commits child molesting, a Class C felony . . .

Although this statute has since been amended, the above language is the statutory language that was in effect at the time the events in question occurred.

> In the case before us, the ultimate questions on the issue of Title IX liability are (1) whether NLCSC through its teachers or supervisors had reason to believe prior to or on May 21, 1993 that a sexual relationship would be likely to develop between Diane M. and Andrew Fields and (2) if so, whether such person or persons had the opportunity to and did take reasonable steps to prevent such happening.

Judge Dillin denied summary judgment on the grounds that there were questions of fact relating to these issues. Nowhere in his June 3 entry did Judge Dillin mention the "unwelcomeness" requirement for Title IX liability. We will not assume that, by focusing on the "notice" and failure to take remedial measures" elements of a Title IX claim, Judge Dillin meant to rule by implication on the required element of "unwelcomeness."

Plaintiff also makes several substantive legal arguments explaining why she believes that "unwelcomeness" is established as a matter of law in this case because of Diane M.'s age and/or because of Andrew Fields' conviction for child molestation. Plaintiff states in her Trial Brief that "[t]he conduct of sexual molestation and statutory rape of a child has been criminalized by our society and deemed so inherently offensive that it is per se 'unwelcome' without exception." (Pltf.'s Trial Brief, at 25). Plaintiff does not, however, cite any authority for this proposition, and we have been unable to find any.[4] Furthermore,

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4. In fact, although there is a dearth of case law on this specific issue, we did find at least one district court opinion in which the court required elementary school students to prove that a teacher's sexual abuse of them was "unwelcome." *See Does v. Covington County School Board of Educ.*, 930 F. Supp. 554, 569 (M.D. Ala.

(Cont'd)

this court has previously stated that the age of consent under Indiana criminal law "has little or no significance in [a] civil action under Title IX. Unwelcomeness is the issue here, not legal capacity to consent." *Smith*, at p. 11, n.2. (alleging that a teacher sexually harassed a high school student). We emphasize again that state criminal law and federal anti-discrimination law comprise entirely separate bodies of law. Thus, "lack of consent," for purposes of the state child molestation statute, is not necessarily the same thing as "unwelcomeness" for the purposes of Title IX. In fact, the Supreme court has made clear that within the context of a Title VII sex harassment suit,[5] it is "unwelcomeness," not "consent," that matters. *Meritor*, 477 U.S. at 68, 106 S. Ct. at 2406.

Plaintiff also argues that *Meritor* requires that "the totality of the circumstances," including the context of the school setting, must be considered in determining whether Andrew Field's conduct toward Diane M. was "unwelcome." We agree that, among other factors, the school setting should be considered,

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(Cont'd)

1996). ("[i]n proving . . . that the harassment was unwelcome, each plaintiff must show that he 'did not solicit nor incite it, and . . . that [he] regarded the conduct as undesirable or offensive.' "). If elementary school students are required to prove unwelcomeness, it follows that a thirteen year old junior high school student must do the same.

5. Courts have consistently looked to Title VII's substantive standards in Title IX actions brought by students. *Smith*, at p. 9 (listing cases); *see also, Doe v. Petaluma City School District*, 1996 WL 432298, at *6); *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1190 (11th Cir. 1996); *Kinman v. Omaha Public School District*, 94 F.3d 463, 467–68 (8th Cir. 1996).

as should the relative ages of Diane M. and Andrew Fields, and any power disparity between them. However, because "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact," *Meritor,* 477 U.S. at 68, 106 S. Ct. at 2406, we believe that the above mentioned factors must be entrusted to the jury to consider and decide. *See also Kinman,* 94 F.3d at 468 (power disparity between the individuals involved must be considered, but unwelcomeness is a question of fact reserved for the jury).

Finally, plaintiff's contention that, because Diane M.'s mother informed a teacher that "dating too soon" was "unwelcome behavior," Fields conduct was thus "unwelcome" as a matter of law for the purposes of Title IX liability is wholly without merit. (See, Pltf's Trial Brief, at 27–28). The question is whether Diane M., not her mother, considered the conduct to be unwelcome, and it is not difficult to imagine that the two views might not always be the same.

For the foregoing reasons, we believe that neither the fact that Diane M. was below the state law age of consent at the time of the events in question, nor the fact that Andrew Fields has been convicted of child molestation under Indiana law, leads to a compelled conclusion that Fields' conduct toward Diane M. was *per se* "unwelcome" for the purposes of stating a Title IX claim. Rather, we believe that the question of unwelcomeness is a question of fact reserved for the jury, and it will be so presented to them in the Court's instructions.

CONCLUSION

For the reasons discussed above, plaintiff's motion to reconsider our prior evidentiary ruling is **denied**, and the

redacted video tape of the October 13, 1992 NLCSC Board meeting is excluded, reserving judgment on whether it might be offered as rebuttal evidence. Finally, we find that the question whether the sexual abuse alleged in this case was "unwelcome" is not established as a matter of law because of Diane M.'s age and Andrew Fields' conviction for child molestation, but is rather a question of fact for the jury to decide.

It is so ORDERED this 18th day of October, 1996.

s/ Sarah Evans Barker
SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

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APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JANUARY 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 97-1285

January 23, 1998

BEFORE

Hon. **WILLIAM J. BAUER**, Circuit Judge
Hon. **JOEL M. FLAUM**, Circuit Judge
Hon. **MICHAEL S. KANNE**, District Judge

MARY M. etc.,

Plaintiff–Appellant,

v.

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION,

Defendant–Appellee

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.

No. 94 C 143

Sarah Evans Barker
Chief Judge.

Appendix D

ORDER

On consideration of the petition for rehearing filed in the above-captioned case by defendant–appellee, all of the judges on the original panel have voted to deny.

Therefore, the petition for rehearing is DENIED.